

ORIGINAL

DOCKET FILE COPY ORIGINAL

RECEIVED

SEP - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

To: The Commission

**Motion for Leave
to File Supplement to Petition for Reconsideration**

Teletouch Licenses, Inc. (TLI), pursuant to Section 1.429(d) of the Commission's Rules, hereby requests leave to file a supplement to its timely filed July 17, 1997 Petition for Reconsideration in the above-captioned proceeding, for good cause shown below.¹

In support thereof, the following is shown:

On July 17, 1997, TLI filed its Petition for Reconsideration of the captioned Report and Order. In its Petition, TLI stated that the Commission's imposition of mandatory contributions to the Universal Service Fund (USF) by paging carriers was tantamount to an unlawful tax. Further, TLI stated that requiring paging carriers to make USF contributions on the basis of end-user revenues was inequitable and contrary to Section 254(d) of the Communications Act of 1934, as amended (the Act).

¹ TLI is filing its Supplement to Petition for Reconsideration concurrently herewith.

No. of Copies rec'd
List ABCDE

0+14

Subsequent to the filing of TLI's July 17, 1997 Petition, the Commission released its final Public Notice on August 11, 1997 (DA 97-1671A) wherein the Commission provided corrected explanatory instructions for preparation of the FCC Form 457 Universal Service Worksheet. In its instructions, the Commission announced, for the first time, that end-user revenues would be based upon billed revenues rather than collected revenues.² The staff stated that this definition would apply to all carriers even though revenues are generally calculated for tax and all other purposes on a cash receipt basis as opposed to the accrual basis used by the Commission's staff for purposes of the Universal Service Fund.³ Thus, in order to comply with the FCC's form of accounting, much of the industry would be forced to convert their accounting practices from cash basis to accrual basis, even though the Securities Exchange Commission and the Internal Revenue Service permit an election between cash and accrual basis of accounting, a change which could have adverse effects for tax planning and other business purposes.

And, on August 29, 1997 (the last business day before the September 2, 1997 FCC Form 457 Universal Service Worksheet filing deadline), during a hastily scheduled meeting between representatives of the paging industry and the staff of the Commission's Common Carrier Bureau, the industry advised the Commission's staff that there was no clear definition in the above-captioned Report and Order of an interstate paging service. Industry

² TLI notes that the worksheet was originally released in an order regarding the reorganization of the Board of Directors of the National Exchange Carrier Association (FCC97-253). By the title of the order and its table of contents, the public was not put on notice that the document would release the Form 457 Universal Service Worksheet, which filing would be due in less than 45 days.

³ Under cash-basis accounting, revenues are received upon receipt of payment, while under accrual-basis accounting, revenues are received when invoiced. The differences between these accounting methods can be significant, and as a result, the election of one method over the other could have a significant impact on other federally mandated filings, including those to the Securities Exchange Commission and the Internal Revenue Service.

representatives stated that paging carriers have no way of knowing where a subscriber is at any moment in time, and thus, cannot determine whether a particular paging message will cross a state boundary if the carrier simulcasts in more than one state, which service may nonetheless be intrastate pursuant to Section 2 of the Act. The industry reasonably believed that in circumstances where a carrier's service area was intrastate e.g., Hawaii, that its service was intrastate, and not subject to the filing of FCC Form 457. In response to this concern, the staff stated that any paging carrier with a paging system that is interconnected to the public switched telephone network would be considered to be an interstate carrier, and thus, would be required to contribute to meet the September 2, 1997 deadline for filing the Universal Service Worksheet.⁴ This was so even though the staff was advised that the interconnection component of the communication is provided by other carriers who (i) collect end-user revenues for that portion of the revenues, and (ii) will make contributions to the universal service fund based upon their revenues derived the interstate component of the communication prior to its receipt by the paging carrier.

Finally, it appears that the staff's definition of interstate paging service (interconnection to the public switched telephone network) is informal staff advice which is not binding upon the public and is nonetheless contrary to the provisions of Sections 2(b)(2) and (b)(3) of the Act, which provide in pertinent part, as follows:

Except as provided in Sections 223 through 227, inclusive, and Section 332 and subject to the provisions of Section 301 and Title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical interconnection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; or (3) any carrier engaged in interstate or

⁴ The staff declined to extend its September 2, 1997 filing deadline and issue an immediate Public Notice so that the industry could be promptly notified of the staff's position on this important issue. The staff stated that only if an otherwise intrastate paging carrier, e.g., with an area of operation only in Hawaii or central Texas, blocks all incoming interstate calls could it avoid interstate status and the September 2, 1997 filing deadline.

foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), or another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier

Because of the above-described events since the filing of TLI's July 17, 1997 Petition, good cause exists for leave to accept TLI's Supplement to Petition for Reconsideration in order to complete the record in this proceeding. See e.g., Amendment of Section 73.202, Table of Allotments, FM Broadcast Stations (Julian, California), 102 FCC 2d 27 (1985).⁵

⁵ In the event that the Commission determines that these issues are more appropriately filed in a separate Petition for Reconsideration, such Petition is timely filed, being within 30 days of the Commission's release of the August 11, 1997 Public Notice - DA 97-1671A. See Graceba Total Communications, Inc. v. FCC, 115 F.3d 1038 (D.C. Cir. 1997) permitting constitutional and statutory challenges to the FCC's application of previously adopted rules even though the period for filing petitions for reconsideration of the rulemaking had expired); see also Public Citizen v. NRC, 901 F.2d 147 (D.C. Cir. 1990) (a challenge to a rule as being contrary to law (made after agency reiterates rule) will not be held untimely because of limited statutory review period), cert. denied, 498 U.S. 992 (1990); see generally Functional Music, Inc. v. FCC, 274 F.2d 543, 546-47 (D.C. Cir. 1958) (Statutory time limit for judicial review of order adopting rule does not foreclose subsequent examination of rule because time limit otherwise would effectively deny many affected parties an opportunity to question its validity), cert. denied, 361 U.S. 813 (1959).

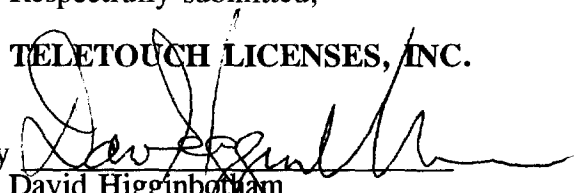
Conclusion

Wherefore, for good cause shown, the instant motion should be granted.

Respectfully submitted,

TELETOUCH LICENSES, INC.

By


David Higginbotham
Senior Vice President

Teletouch Licenses, Inc.
P.O. Box 7370
Tyler, TX 75711

(903) 595-8800

Filed: September 9, 1997